IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No._185 of 2000..

Judgement reserved on: 29.10.2007.

Date of decision: 29.11.2007.

Rahul Bhargava ….. Appellant.

Vs.

Vinod Kohli & ors. …. Respondents.

Coram

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?[1]

For the Appellant : Mr. Ajay Kumar, Advocate.

For the Respondents : Mr. R.L.Sood, Sr. Advocate with Mr. Vikas Rajput, Advocate, for respondents No. 1 & 2.

Mr. Varinder Verma, Additional Advocate General, for respondent No.3.

Kuldip Singh, Judge.

The defendant No. 1 is in appeal against the judgement, decree, dated 1.3.2000, passed by learned District Judge, Shimla in Civil Appeal No. 34-S/13 of 1997, reversing judgement and decree, dated 30.4.1997, passed by learned Sub Judge (1), Shimla in Case No. 15/1 of 96/90.

2. The facts as emerge from the plaint are that respondents No. 1, 2 filed a suit for specific performance on the basis of

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Whether the reporters of the local papers may be allowed to see the Judgment?

agreement, dated 7.6.1989 and permanent prohibitory injunction against appellant- defendant No.1. The respondent No.3 was also impleaded as defendant No.2 in the suit. It has been alleged that husband of respondent No.1 was tenant under father of appellant in Cottage No.1, Bhargav Estate, Tutikandi. The father of appellant approached respondent No.2 and offered to sell to respondent No.1 or respondent No.2 Cottage No.2 comprised in khasa Nos. 549/513/342/1 and 546/334/1 and ultimately, it was agreed that respondent No.1 would purchase Cottage No.2, for a sale consideration of Rs.90,000/-. In absence of permission, under Section 118 of the H.P. Tenancy and Land Reforms Act, 1972 (for short, the Act) immediate execution and registration of the sale deed was not possible, therefore, it was agreed to enter upon an agreement to sell and accordingly an agreement dated 7.6.1989 was executed between the parties for selling Bhargav Cottage No. 2 by appellant in favour of respondent No.1 for a total sale consideration of Rs.90,000/-. The respondent No.1 paid total sale consideration of Rs. 90,000/- to appellant. The respondent No.1 came in possession of the property and even started collecting rent from tenants occupying said property. The sale deed could not be executed for want of permission, under Section 118 of the Act.

3. The respondent No.1 executed and registered irrevocable power of attorney in favour of respondent No.2 authorizing him to execute and register the sale deed in favour of respondent No.1 on behalf of appellant. The respondent No.1 also

executed a will in respect of the property in question in order to protect her rights.

4. The appellant and his father later on orally informed respondents No. 1 and 2 that they will have to pay additional amount of Rs. 1,00,000/- over and above Rs.90,000/- for which property was agreed to be sold under the agreement, and, therefore, notice dated 1.6.1990 was issued by appellant to respondents No. 1 and 2. The respondents No.1 and 2 were informed by the appellant that he was cancelling, revoking the power of attorney executed by him in favour of respondent No. 2 and he was resiling from the agreement dated 7.6.1989. In these circumstances, respondents No.1 and 2 filed a suit for specific performance of contract and permanent prohibitory injunction on the basis of agreement dated 7.6.1989 with respect to property comprised in khasra Nos. 536/334/1 and 549/513/342/1 measuring 0-02-00 bigha, situate in Mouza Dhar, Tutikandi, District Shimla popularly known as Bhargav Cottage No. 2, Tutikandi, Shimla. The respondent No. 1 got permission from the State Government to purchase the property in question, which was conveyed to her vide letter dated 31.1.1991.

5. The suit was contested by respondent No.1 by filing written statement, in which preliminary objection of maintainability of the suit has been taken. It has been submitted that suit is hit by Section 41(e) of the Specific Relief Act, 1963. On merits, it has been submitted that agreement for sale was brought by respondents No. 1 and 2 with appellant by fraud and by misrepresenting the facts that respondent No.1 was an agriculturist and entitled to purchase the

property under the Act. At the time of execution of the agreement, respondents No.1 and 2 had shown their inability to have the sale deed executed on account of financial constraints and for this reason the respondents No. 1 and 2 induced appellant on the basis of false representation and fraud to execute general power of attorney in favour of respondent No.1.

6. The respondents No.1 and 2 succeeded in getting the agreement executed by practicing fraud and by misrepresentation of facts. The appellant was duped to enter into an agreement for Rs.90,000/- whereas market value of the property was Rs.3,00,000/-. The agreement is void, ab-initio and is hit by Section 118 of the Act. The documents were got executed by respondents No.1 and 2 from appellant with a view to circumvent and defeat the Act as well as the provisions of H.P. Town and Country Planning Act, 1977. These documents do not confer any right, title or interest in favour of respondents No.1 and 2, because the object of the same is unlawful and against the public policy. The respondent No.1 has no right to collect the rent from the tenants as the agreement has already been cancelled and is otherwise illegal. It has been denied that appellant or his father demanded additional sum of Rs.1,00,000/- from respondents No.1 and 2. The power of attorney has already been cancelled and revoked much prior to the filing of the suit. Respondents No. 1 and 2 have no right title or interest in the suit property. The appellant is ready and willing to refund the earnest money to respondent No.1. The appellant prayed for dismissal of the suit and by way of counter claim a declaration was also prayed in

favour of appellant and against respondents No.1 and 2 to the effect that agreement dated 7.6.1989 is null and void and does not confer any right, title or interest on respondent No.1 with respect to suit property and is incapable of specific performance with a decree of permanent prohibitory injunction restraining the respondents from realizing the rent of property known as Bhargav Cottage No.2, Tutikandi, Shimla or from making any use of general power of attorney dated 8.6.1989.

7. The trial court under issue No.2 held that agreement to sell is not legally enforceable and under issue No. 6 has held that counter claim of the appellant (defendant No.1) is liable to be decreed and ultimately dismissed the suit and decreed the counter claim of the appellant on 30.4.1997. The respondents No.1 & 2 filed appeal against the decision dated 30.4.1997, which has been allowed by the learned District Judge on 1.3.2000, hence appellant (defendant No.1) is in appeal. The appeal has been admitted on following substantial questions of law:-

1. Whether any transaction of sale entered contrary to the mandatory provisions of section 118 of the H.P. Tenancy and Land Reforms Act, 1974 or offending the said law is enforceable in law?

2. Whether after holding that the transaction in suit is hit by Section 118 of the H.P. Tenancy and Land Reforms Act, 1974, the learned District Judge, Shimla, could pass a decree for specific performance?

3. Whether the First Appellate Court could pass a decree in infinity and whether such a decree can be passed in law at all?

8. I have heard the learned counsel for the parties and gone through the record. Mr. Ajay Kumar, learned counsel for the appellant has submitted that agreement dated 7.6.1989 Ex. PW 1/A is in violation of Section 118 of the Act, and therefore, it is not enforceable. He has also submitted that learned District Judge has passed a decree in infinity, which under the law is impermissible. He has also submitted that the agreement is the result of fraud and misrepresentation played by respondents No. 1 and 2 on appellant and agreement is nullity. This is an additional substantial question of law arising from the record of the case and, therefore, he may be permitted to be heard on this additional substantial question of law under proviso to sub-section (5) of Section 100 CPC. Mr. R.L.Sood, learned Senior Counsel appearing for respondents No. 1 and 2 has submitted that execution of the agreement Ex. PW 1/A has been proved. He has submitted that for filing a suit for specific performance of contract on the basis of the agreement, dated 7.6.1989 Ex. PW 1/A, no prior permission, under Section 118 of the Act, is required. In any case, respondent No.1 has obtained such permission, which lapsed during litigation and for this respondent No.1 cannot be blamed. He has supported the impugned judgement, decree. He has opposed the request of learned counsel for the appellant for hearing appellant on additional substantial question of law, as submitted by him. He has submitted that no application

seeking leave to urge on additional substantial question of law has been filed by the appellant and respondents No.1, 2 cannot be taken by surprise by making an oral prayer for hearing on additional substantial question of law.

Substantial questions of law No. 1 to 3.

9. The substantial questions of law No.1 to 3 are interconnected, therefore, they are being disposed of collectively, but before that, request of learned counsel for the appellant is to be considered for hearing him on additional substantial question of law, as submitted by him. The relevant part of Section 100 CPC is reproduced here-in-below:-

> *"**100. Second appeal.-** (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.*
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> *(2) .....*
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> *(3) .....*
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> *(4) .....*
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> *(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question.*
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> *Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."*

Section 101 CPC bars second appeal except on the grounds mentioned in Section 100 CPC.

10. Rule 2 of Order 41 CPC bars the appellant to urge on any other substantial question of law not framed by the Court except with the permission of the court given in accordance with Section 100 CPC. The leave of the court is required under the Code of Civil Procedure in many situations and some of the provisions where leave of the court is required are Section 92, Order 2 Rules 2 and 4, Order 7 Rule 18, Order 8 Rules- 8-A and 9, Order 37 Rule 3 CPC etc. In criminal matters also, leave to file an appeal is required under sub-section (3) and (4) of Section 378 of the Code of Criminal Procedure. It is not the intention of the law that wherever leave of the court is required then simple oral request to this effect is sufficient. The collective reading of Rule 2 of Order 41 and Section 100 CPC makes it clear that the appellant is required to seek the leave of the court for urging on any substantial question of law not framed by the court and such permission is to be granted for reasons to be recorded. The reasons can be recorded in writing only and therefore, the appellant is required to file an application seeking leave of the court to urge on additional substantial question of law not earlier framed by the Court. In the present case, the appellant has not filed any application seeking leave to urge on any substantial question of law not framed by the Court. The appellant cannot take by surprise to the opposite side by making oral request at the time of hearing to urge on additional substantial question of law not earlier framed. The respondents have every right to oppose the request of the appellant for hearing on additional substantial question of law and

in case despite opposition of the respondents, such leave is granted, then respondents should also get some time to prepare on additional substantial question of law. In this context, oral request of learned counsel for appellant seeking leave to urge on additional substantial question of law is not in consonance with the spirit of law. Hence, request to urge on additional substantial question of law, as prayed, is declined.

11. The substantial question of law No. 1 covers the question regarding enforceability of agreement, dated 7.6.1989 Ex. PW 1/A through a suit of specific performance. The execution of the agreement has been proved. The learned counsel for appellant has submitted that Section 118 of the Act prohibits the transfer of land including the transfer by a decree of civil court or for recovery of arrears of land revenue by way of sale, gift, will, exchange, lease, mortgage with possession, creation of tenancy or in any other manner in favour of a person who is not an agriculturist, notwithstanding anything to the contrary contained in any law, contract, agreement, custom or usage for the time being in force, but save as otherwise provided in Chapter XI of the Act. It includes Benami transaction and an authorization made by the owner by way of special or general power of attorney or by an agreement with the intention to put a non-agriculturist in possession of the land and allow him to deal with the land in the like manner, as if he is the real owner of the land.

12. He has submitted that as per case of respondents No. 1 and 2 entire sale consideration has been paid to the appellant and

even respondent No.1 is in possession of the property under the agreement and realizing rent, such agreement is prohibited under Section 118 of the Act and is not enforceable. Section 118 of the Act has been amended several times and as of now agreement of the nature mentioned in sub-clause (B) of clause (iii) of sub-section (1) of Section 118 is prohibited. It is not the case of the appellant that the agreement Ex. PW 1/A was executed with the intention to put respondent a non-agriculturist in possession of the property and allow her to deal with the property in the manner as if she was real owner of the property. This apart, the agreement was executed on 7.6.1989, therefore, the position of Section 118 of the Act is to be seen on the date of agreement, dated 7.6.1989. Section 118 of the act was substituted vide Section 4 of Act No.6 of 1988 and as on 14.4.1988 Section 118 of the Act was as follows:-

> *"**118.** Transfer of land to non-agriculturists barred.- (1) Notwithstanding anything to the contrary contained in any law, contract, agreement, custom or usage for the time being in force, but save as otherwise provided in this Chapter, no transfer of land (including sales in execution of a decree of a civil court or for recovery of arrears of land revenue), by way of sale, gift, exchange, lease, mortgage with possession or creation of a tenancy shall be valid in favour of a person who is not an agriculturist.*
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> *(2) Nothing in sub-section (1) shall be deemed to prohibit the transfer of land by any person in favour of--*
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> *(a) a landless labourer; or*
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> *(b) a landless person belonging to a scheduled caste or a scheduled tribe; or*
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> *(c) a village artisan; or*
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> *(d) a landless person carrying on an allied pursuit; or*

(e) the State Government; or

(f) a co-operative society or a bank; or

(g) a person who has become non-agriculturist on account of the acquisition of his land for any public purpose under the land Acquisition Act, 1894; or (1 of 1894).

(h) a non-agriculturist who purchases or intends to purchase land for the construction of a house or shop, or purchases a built up house or shop from the Himachal Pradesh state Housing Board established under the Himachal Pradesh Housing Board Act, 1972 (10 of 1972), or from the Development Authority constituted under the Himachal Pradesh Town and Country Planning Act, 1977 (12 of 1977), or from any other statutory corporation set up under any State or Central enactment; or

(i) a non-agriculturist with the permission of State Government for the purpose that may be prescribed;

Provided that a person who is a non-agriculturist but purchases land with the permission of the State Government under clause (i) of this sub-section shall, irrespective of such permission, continue to be a non-agriculturist for the purposes of the Act:

Provided further that a non-agriculturist in whose case permission to purchase land is granted by the State Government, shall put the land to such used for which the permission has been granted, within a period of two years or a further such period, not exceeding one year, as may be granted by the State Govt. to be counted from the day on which the deed covering the sale of the land is registered and if he fails to do so, the land so purchased by him shall vest in the State Government free from all encumbrances.

(3) No Registrar or the Sub-Registrar appointed under the Indian Registration Act, 1908 shall register any document pertaining to a transfer of land, which is in contravention to sub-section (1) and such transfer shall be void abinitio and the land involved in such transfer, if made in contravention of sub-section (1), shall, together with structures, buildings or other attachments, if any, vest in the State Govt. free from all encumbrances: (16 of 1908).

Provided that the Registrar or the Sub-Registrar may register any transfer—

(i) where the lease is made in relation to a part or whole of a building; or

(ii) where the mortgage is made for procuring the loans for construction or improvements over the land either from the Government or from any other financial institution constituted or established under any law for the time being in force or recognized by the State Government.

(4) It shall be lawful for the State Government to make use of the land which is vested or may be vested in it under sub-section (2) or sub-section (3) for such purposes as it may deem fit to do so.

Explanation—For the purpose of this section, the expression "land" shall include—

(i) land, the classification of which has changed or has been caused to be changed to "Gair-mumkin", "Gair-mumkin Makan" or any other Gair-mumkin land by whatever name called, during the past five year countable from the date of entry in the revenue records to this effect;

(ii) land recorded as "Gair-mumkin", "Gair-mumkin Makan" or any other Gair-mumkin land, by whatever came called in the revenue records, except constructed area which is not subservient to agriculture; and

(iii) land which is a site of a building in a town or a village and is occupied or let out not for agricultural purposes or purposes subservient to agriculture.

5. Savings.- Notwithstanding anything contained in this Act, any transfer of land, situate within the territorial jurisdiction of a municipal corporation, municipal committee or a notified area committee, for any of the purposes, i.e. for the construction of a dwelling house, a shop or a commercial establishment or office or industrial unit, made before the day on which the Himachal Pradesh Tenancy and Land Reforms (Amendment) Act, 1987 is published in the Official Gazette after its assent, shall be deemed always to have

been made in accordance with the law as if sub-section (2) of section 118 of the principal Act had not been amended by section 4 of this Act."

13. The suit was filed on 7.6.1990, therefore, rights of the parties crystallized on the date of agreement, dated 7.6.1989 and on the date of filing of the suit on 7.6.1990. It has not been pointed out that Section 118 of the Act was further amended after it was substituted vide Section 4 of Act No. 6 of 1988 and before the agreement and filing of the suit. On the date of agreement and the filing of the suit, there was no restriction for entering into an agreement of the nature executed on 7.6.1989 between respondent No.1 and appellant and it cannot be said that the agreement Ex. PW 1/A on the date of its execution was in violation of Section 118 of the Act existing on that date. The suit for specific performance filed on the basis of the agreement, dated 7.6.1989 Ex. PW 1/A is valid and maintainable. It has been proved on record that respondent No.1 got permission to purchase the suit property, vide Ex. PW 3/A dated 31.1.1991, which was valid for 180 days, which expired during the pendency of litigation. The respondent No.1 cannot be blamed for this. The respondent No.1 can obtain fresh permission or she can request for renewal of permission already granted in her favour. In these circumstances, no fault can be found with the agreement and the suit filed by respondents No.1 and 2 for specific performance and injunction on the basis of agreement.

14. There is another aspect of the case, for filing a suit for specific performance on the basis of agreement, no permission is required, under Section 118 of the Act. It is only if the suit is decreed

such permission may be required at the time of registration of the sale deed on the basis of specific performance decree. In **Manzoor Ahmed Magray** vs. **Ghulam Hassan Aram and others** (1999) 7 SCC 703, the Hon'ble Apex Court has held as follows:-

> *"It is to be stated that the appellant has neither raised the said contention in the written statement nor during the trial. However, in the appeal, the appellant sought to raise the contention that the specific performance qua the suit land cannot be granted as the transfer or alienation of the suit property is prohibited under the provisions of the J&K Agrarian Reforms Act, 1972, the J&K Agrarian Reforms Act, 1976 and the J&K Prohibition on Conservation of Lands and Alienation of Orchards Act, 1975. The Court declined to entertain the plea on the ground that it was raised almost 24 years after the filing of the suit by the plaintiff and the same, if permitted to be raised, would prejudice the rights of the plaintiff. Even considering that the said plea is a pure question of law, in our view, it is without any substance. The definition under Section 2(4) of the J&K Agrarian Reforms Act, 1972 specifically excludes "land" which was an orchard on the first day of September 1971. Sub-section (5) of Section 2 defines "orchard" to mean a compact area of land having fruit trees grown thereon or devoted to cultivation of fruit trees in such number that the main use to which the land is put is growing of fruits or fruit trees. In the present case, agreement to sell was executed on 14.7.1971 in respect of an orchard land. Therefore, the said Act was not applicable to the land in dispute. Similar provisions are there in the Agrarian Reforms Act, 1976 which gives the definition of the word "land" under Section 2(9) and definition of the word "orchard" under Section 2(10). From the said definition, it is apparent that orchard is excluded from the operation of the Agrarian Reforms Act.*
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> *Learned counsel for the appellant, however, further referred to Section 3 of the J&K Prohibition on Conversion of Land and Alienation of Orchards Act, 1975 which is as under:-*

`3. Prohibition on conversion of land and alienation of orchards.- (1) Notwithstanding anything contained in any other law for the time being in force----

(a) no person shall alienate an orchard except with the previous permission of the Revenue Minister or such officer as may be authorized by him in this behalf;

Provided that alienation of orchards to the extent of four kanals only in favour of one or more persons for residential purposes shall not need any permission.

(b) …. …. ….

Considering the aforesaid section, it is apparent that prohibition on transfer of orchards is not absolute and the question of obtaining previous permission as contemplated under Section 3(1)(a) would arise at the time of execution of the sale deed on the basis of decree for specific performance. Section 3 does not bar the maintainability of the suit and permission can be obtained by filing proper application after the decree is passed. Therefore, it cannot be stated that decree for specific performance is not required to be passed. Further, under Section 3 of the J&K Prohibition on Conservation of Land and Alienation of Orchards Act, 1975, prohibition on transfer is limited. Firstly, the proviso makes it clear that alienation of orchards to the extent of four kanals only in favour of one or more persons for residential purposes will not require any permission. Secondly, for more than four kanals of land, previous permission of the Revenue Minister or such officer as may be authorized by him in this behalf is required to be obtained. Dealing with similar contention, this Court in Bai Dosabai v. Mathurdas Govinddas [1980 (3) SCC 545] observed that even if the Act prohibits alienation of land, if the decree is passed in favour of the plaintiff, it is required to be moulded suitably."

15. On the point of alienation/ transfer of land after permission Section 3 of J&K Act noticed above and Section 118 of

the Act in substance are similar. There is no absolute prohibition, under Section 118 of the Act on transfer of land to non-agriculturist and transfer can be made in favour of non-agriculturist with permission of Government under Section 118 of the Act. This question at the most will arise at the time of execution of sale deed on the basis of decree for specific performance. Section 118 of the Act does not bar the maintainability of the suit for specific performance and injunction on the basis of agreement. The respondent No.1 had earlier obtained permission from the State Government for purchasing the property vide permission Ex. PW 3/A.

16. It has been submitted that learned District Judge has passed the decree in infinity by ordering that the appellant (defendant No.1) would execute the sale deed in respect of the suit property in favour of respondent No.1 within one month of the renewal of the permission, under Section 118 of the Act. The execution of decree of specific performance is also governed by law of Limitation and, therefore, the plea of learned counsel for the appellant that learned District Judge has passed decree in infinity is not tenable. The learned District Judge has rightly appreciated the material on record. No case for interference has been made out. The substantial questions of law No. 1 to 3 are decided against the appellant and in favour of respondents No.1 and 2. The impugned judgement, decree do not require any interference.

17. No other point was urged.

18. The result of the above discussion, the appeal fails and is accordingly dismissed.

November 29, 2007. **(Kuldip Singh)**
(*Hem*) **Judge.**